No. 86-1546

UNITED STATES SUPREME COURT

October Term, 1986

CENTRAL MACHINERY COMPANY,
an Arizona corporation,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A NON-INDIAN SELLER OF MACHINERY TO INDIANS HAS STANDING TO ASSERT AN INDIAN ENTITY'S RIGHTS, PRIVILEGES AND IMMUNITIES UNDER 42 U.S.C. § 1983.

2. WHETHER THE INDIAN TRADER STATUTES, 25 U.S.C. §§ 261-264, WHICH PREEMPTED STATE TAXATION OF MACHINERY BY A NON-INDIAN SELLER TO AN INDIAN ENTITY IN CENTRAL MACHINERY v. ARIZONA, 448 U.S. 160 (1980), ALSO CREATED A RIGHT TO ACTION UNDER 42 U.S.C. § 1983 SO AS TO ENTITLE THE NON-INDIAN SELLER TO ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

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STATEMENT OF THE CASE

This case originated as a state tax case. The lawsuit was commenced in the Arizona Superior Court in 1974 pursuant to A.R.S. § 42-1339, providing for a taxpayer's suit for refund of state taxes paid. The Arizona Supreme Court held that the non-Indian seller's sale of tractors to an Indian entity was subject to Arizona's transaction privilege tax. Arizona v. Central Machinery, 121 Ariz. 183, 589 P.2d 426 (1979). This Court reversed. 448 U.S. 160 (1980). Upon remand, Central Machinery attempted to convert its state tax refund action to a 42 U.S.C. § 1983 action in order to obtain attorney's fees under 42 U.S.C. § 1988. That attempt was ultimately rejected by the Arizona Supreme Court. Central Machinery Company v. State of Arizona, ___ Ariz. ___, 730 P.2d 843 (1986).

ARGUMENT

I

CENTRAL MACHINERY COMPANY, A NON-INDIAN ARIZONA CORPORATION, LACKS STANDING TO ASSERT A 42 U.S.C. § 1983 CLAIM

Arizona does not deny that Central Machinery, as an Arizona corporation and a taxpayer, has standing under state law to challenge its payment of transaction privilege taxes and was entitled to sue for a refund of taxes paid under protest. However, standing under state law to sue for a tax refund does not transmute into standing under 42 U.S.C. § 1983 for the redress of rights, privileges and immunities protected under federal laws and federal constitution.

Although the Arizona Supreme Court found that Central Machinery has standing to raise the § 1983 issue, a state court's finding of standing does not ipso facto confer standing in this Court. In reviewing a state court judgment, this Court is

bound by the Article III requirement of case and controversy. Doremus v. Board of Education, 342 U.S. 429, 434 (1952); Tileston v. Ullman, 318 U.S. 44 (1943); Bateman v. Arizona, 429 U.S. 1302 (1976) (opinion of Mr. Justice Rehnquist).

The Arizona Supreme Court found that Central Machinery had standing to raise the arguments on behalf of the Indian entity because it agreed, through its attorney, that any award of attorney's fees would be disbursed to Gila River Farms (the Indian entity). Such a voluntary agreement cannot confer standing which will satisfy the Article III requirement of case or controversy.

Under Article III analysis, there is no case or controversy between Arizona and Central Machinery because Central Machinery has suffered no injury whatsoever as a result of the imposition of the State's transaction privilege taxes. The tax was

passed on to the purchaser, Gila River Farms. Lacking any direct injury, Central Machinery has no standing to challenge the validity of the Arizona tax. Worth v. Seldin, 422 U.S. 490 (1975). Admittedly, this Court, in Central Machinery v. Arizona, 448 U.S. 160 (1980), reached the merits of the preemption issue and invalidated the tax on the sale of the tractors. However, the standing issue in that case is vastly different from the case here. In its opinion this Court referred to the fact that, in the state court proceeding, it was stipulated that Central Machinery would pay over any tax refund to Gila River Farms, the Indian entity. 448 U.S. at 162, n. 2. That reference simply stands for the proposition that standing existed for tax refund purposes. Standing existed there because only the payer of the tax, Central Machinery, could have filed a tax protest under Arizona law.

Accordingly, under jus tertii principles, Central Machinery had standing to raise the preemption issue since no one else could do so. Barrow v. Jackson, 346 U.S. 249 (1953); Eisenstadt v. Baird, 405 U.S. 438 (1972). That standing analysis, however, does not apply in the case of a 42 U.S.C. § 1983 action. Section 1983 clearly permits the Indian entity, Gila River Farms, in its own name to sue state tax officials, asserting the deprivation of its rights, privileges and immunities. Accordingly, since Gila River Farms could have brought its own § 1983 action or intervened in the state court proceeding, Central Machinery cannot act as a proxy for Gila River Farms in asserting a § 1983 claim for the purpose of obtaining 42 U.S.C. § 1988 attorney's fees. Indeed, this case presents the very danger that this Court noted in Singleton v. Wulff, 428 U.S. 106 (1976):

> [T]hird parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore shold prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis. Id. at 114.

To confer standing via a voluntary agreement would also trivialize § 1983. To permit standing by agreement, an insurer of a motor vehicle or other personal property could claim a § 1983 violation against a creditor who unconstitutionally repossessed and damaged the motor vehicle or personal property insured. In such cases, instead of protecting important personal and civil rights, 42 U.S.C. § 1983 would become a vehicle for financial institutions to reach a deep pocket for the purpose of obtaining financial satisfaction and little else.

II

THERE IS NO CONFLICT BETWEEN THE ARIZONA COURT'S DECISION AND THIS COURT'S PRECEDENTS

Central Machinery argues that the Arizona Court's decision is in conflict with Wright v. Roanoke Redevelopment and Housing Authority, ___ U.S. ___, 107 S.Ct. 766 (January 14, 1987). That argument is wrong.

Wright is a pure vanilla entitlement case such as Maine v. Thiboutot, 448 U.S. 1 (1980). In Wright the Brooke Amendment required that public housing tenants pay only a reasonable sum for utilities. The Housing Authority allegedly charged an excessive amount for utilities which was included in the rent charged, resulting in overpayments of rent by the tenants. The tenants were therefore deprived of the protection accorded them by the Brooke Amendment. This Court held that a claim under 42 U.S.C. § 1983 existed under these

facts. It is clear that, in Wright, tangible monetary benefits, to which the tenants were entitled, were denied to them by the action of the Housing Authority.

This case is different from Wright. It is not an entitlement case. The State of Arizona had not traded with the Indians in contravention of the Indian trader statutes. The transaction privilege tax which was imposed on all such transactions within the State of Arizona was merely held by this Court in its decision to have been preempted by the Indian trader statutes and invalid under the Supremacy Clause. Accordingly, Arizona did not violate any of the Indian trader statutes and did not deprive any Indians of any benefits they were entitled to under the Indian trader statutes.

This Court's decision in Central Machinery was a recognition that, in this field of taxation, Congress has allocated

authority between national and state governments and, in that allocation, Arizona taxation of the sale of tractors by a non-Indian to an Indian entity is invalid because such taxation intrudes into the sphere allocated solely to the national government.

> When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type--which falls into the individual rights category of constitutional issues ... --is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the constitution has been violated, he implicitly concedes that one of the two levels of government--national or state--has the power to engage in the questioned conduct. The core of the argument is simply that the particular government that has

> acted is the constitutionally improper one. To put it another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether.

J. Choper, Judicial Review in the National Political Process, 174-75 (1980), quoted with approval in the following cases: United Nuclear Corp. v. Cannon, 564 F.Supp. 581, 586-7, (D.R.I. 1983); Consolidated Freightways v. Kassel, 556 F.Supp. 740, 746 (S.D.Iowa 1983), aff'd, 730 F.2d 1139 (8th Cir.), cert. denied, 105 S.Ct. 126 (1984); and White Mountain Apache Tribe v. Williams, 798 F.2d 1205, 1209 (9th Cir. 1986), cert. denied sub nom White Mountain Apache Tribe v. Arizona Transportation Board, ___ U.S. ___, 107 S.Ct. 940 (1987), rehearing denied, ___ U.S. ___ (March 23, 1987), amended, 810 F.2d 844 (9th Cir. February 10, 1987).

In White Mountain Apache Tribe v. Williams, id.,[1] based on facts very similar to those in this case, the Ninth Circuit Court of Appeals held that this Court's invalidation of the Arizona motor carrier license tax and a use fuel tax under the Supremacy Clause, based on the preemption by federal Indian timber laws, did not implicate a 42 U.S.C. § 1983 claim and reversed the award of § 1988 attorney's fees by the district court.

In the White Mountain opinion, the Court of Appeals carefully examined the underpinnings of the Supremacy Clause and concluded that it was essentially a power-conferring provision that protects individuals against government intrusion.[2]

1. The White Mountain Apache Tribe case was a companion case to the Central Machinery case in this Court in 1980. See White Mountain Apache Tribe v. Williams, 448 U.S. 136 (1980).

2. The White Mountain Apache Tribe case was followed in Segundo v. City of Rancho Mirage, ___ F.2d ___ (9th Cir. 4/2/87).

See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) (the Supremacy Clause is not a substantive constitutional provision that creates rights within the meaning of 28 U.S.C. § 1343(3)). See also Consolidated Freightways v. Kassel, 730 F.2d 1139 (8th Cir. 1984), cert. denied, 105 S.Ct. 126 (1984), (a Commerce Clause claim does not come within the meaning of 42 U.S.C. § 1983). The Seventh, Tenth and Eleventh Circuit Courts of Appeal have all decided that federal preemption claims do not come within the meaning of § 1983. Gould, Inc. v. Wisconsin, 750 F.2d 608 (7th Cir. 1984), affirmed on other grounds, ___ U.S. ____, 106 S.Ct. 1057 (1986) (claim of preemption of state labor laws by the federal National Labor Relations Act does not come within § 1983 so as to authorize § 1988 attorney's fees); J & J Anderson v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985) (claim of preemption

of town ordinance by Federal Aviation Act does not come under § 1983). Pirolo v. City of Clearwater, 711 F.2d 1006, rehearing denied, 720 F.2d 688 (11th Cir. 1983) (preemption of city ordinance by Federal Aviation Act does not come within § 1983).

A number of district courts have come to the same conclusion. Yakima Indian Nation v. Whiteside, 617 F.Supp. 735 (E.D. Wash. 1985) (federal preemption claim asserted by the Indian tribe does not come within the meaning of § 1983); Pesticide Public Policy Foundation v. Village of Wauconda, 622 F.Supp. 423 (N.D. Ill. 1985) (alleged conflict between village ordinance and Federal Fungicide and Rodencide Act does not come within § 1983); United Nuclear Corp. v. Cannon, 564 F.Supp. 581 (D.R.I. 1983) (preemption of state law by the Federal Atomic Energy Act does not fall within § 1983); New York Airlines, Inc. v. Dukes County, 623 F.Supp. 1435

(D.Mass. 1985) (preemption of county ordinance by the Federal Aviation Act does not come within § 1983).

III

THERE IS NO CONFLICT BETWEEN THE ARIZONA SUPREME COURT'S OPINION AND STATE COURT DECISIONS

In addition to the four circuit courts of appeal and the four district court decisions cited, supra, the New Hampshire Supreme Court concluded that a Supremacy Clause challenge does not implicate § 1983. Private Truck Council v. New Hampshire, ___ N.H. ____, 517 A.2d 1150 (1986).

Arrayed against this overwhelming weight of authority is one state court decision cited by the petitioner to be in conflict with the Arizona decision here. It can be easily distinguished.

The New Mexico decision, Ramah Navajo School Board, Inc. v. Bureau of Revenue,

104 N.M. 302, 720 P.2d 1243 (Ct.App. 1986), is not in direct conflict with the Arizona decision here. The New Mexico court agrees that the Supremacy Clause does not create § 1983 rights. 720 P.2d at 1255. It found, however, that the Indian Self-Determination and Educational Assistance Act granted to the Indians the right to education, and that the New Mexico law, in taxing the building of the school, violated that right. It is noteworthy that the Ramah lawsuit originally proceeded in New Mexico on two claims: (1) that the state tax violated the Indian Self-Determination and Education Act, and (2) the preemption claim under the Supremacy Clause. See Ramah, 720 P.2d at 1252. Unlike Ramah, Central Machinery never asserted any claim other than the preemption claim throughout the litigation on its tax claim. This stands in sharp contrast to Ramah, where the New Mexico state court awarded attor-

ney's fees under § 1988 on the non-preemption claim.

CONCLUSION

The petition or writ of certiorari should be dismissed, since Central Machinery lacks standing under Article III's case or controversy requirement.

The petition for writ of certiorari should also be denied. The Arizona Supreme Court's decision follows all controlling decisions of this Court. It is consistent with all other federal circuit and district court cases on the issue of whether preemption claims under the Supremacy Clause come within the meaning of § 1983.

Respectfully submitted,

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